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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 303

JOHN DONALD WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (R. 668-678) are reported at 190 F. 2d 481.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1951 (R. 678). A petition for rehearing was denied on August 6, 1951 (R. 690). The petition for a writ of certiorari was filed on September 5, 1951. The jurisdiction of this Court

is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the summation of the prosecutor provoked by petitioner's own summation was so prejudicial that it deprived petitioner of a fair trial, where petitioner offered no instruction with respect thereto and the judge charged the jury not to regard the arguments of counsel as evidence.

2. Whether a motion to suppress evidence was properly denied where there was uncontradicted testimony that both petitioner and the person in sole possession of the premises and property seized consented to the search and seizure.

3. (a) Whether an indictment which charges transportation of a specified fraudulently taken "sum" sufficiently charges an offense under 18 U.S.C. 415 (now 2314), when the bill of particulars and proof showed that the "sum" included both cash and traveler's checks.

(b) Whether cash and traveler's checks were fraudulently taken within the meaning of 18 U.S.C. 415 (now 2314) when they were obtained by cashing other admittedly fraudulently obtained checks, particularly where there was evidence that the cashing of the checks was part of a continuing fraud.

STATUTE INVOLVED

The National Stolen Property Act of May 22, 1934, c. 333, § 3, 48 Stat. 794, as amended by the Act of August 3, 1939, 53 Stat. 1178, 18 U.S.C.

(1946 ed.) 415, now 18 U.S.C. (1948 rev.) 2314, provided:

> Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been stolen, feloniously converted, or taken, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both * * *.

STATEMENT

An indictment in two counts, filed in June 1948 in the United States District Court for the Southern District of New York, charged petitioner with wilfully and knowingly transporting in interstate commerce from Houston, Texas, to New York City the sums of $26,000 and $23,500, respectively, which sums he had theretofore feloniously taken by fraud and with intent to steal (R. 7). At his first trial, petitioner was convicted on both counts and sentenced to ten years' imprisonment on each count, the sentences to run concurrently (R. 1). This sentence was reversed by the United States Court of Appeals for the Second Circuit on the grounds that the District Court erred in permitting petitioner's lawful wife, Clara Duerr Walker, to testify against him. *United States* v. *Walker*, 176 F. 2d 564, certiorari denied, 338 U. S. 891. The Court of

Appeals, however, considered petitioner's other contentions, most of which he now makes in his petition, and found them to be without merit. See Government's petition for a writ of certiorari, No. 350, O.T. 1949.

At the second trial, petitioner was again convicted on both counts. He was sentenced to ten years' imprisonment on the first count, five years' imprisonment on the second count and to pay a fine of $10,000 on each count, the prison terms to run consecutively (R. 1).

The facts adduced at the second trial may be summarized as follows:

In November 1946, petitioner, lawfully married to Clara Duerr Walker (R. 385), met Mrs. Mary Ashe, a wealthy divorcee of San Antonio, Texas, on a train while she was en route to her home. He represented himself to be a man of great wealth with business affairs. She, in turn, disclosed her property holdings. (R. 234-238.) On the evening of her arrival home she received an orchid from petitioner, accompanied by an affectionate note. Thereafter, she received frequent telephone calls, orchids and notes from petitioner. In a telephone conversation he informed her that in early January he would be coming through San Antonio and asked her to arrange for his lodging at a local hotel. Petitioner later informed Mrs. Ashe that he would arrive on January 5 and told her that he was falling in love with her. (R. 238-240.)

Immediately prior to his going to San Antonio, petitioner, on December 27, 1946, entered into a bigamous marriage with Mrs. Sally Pritchard Grehan at Versailles, Kentucky (R. 389-390, 396). Petitioner had met Mrs. Grehan at a restaurant in Lexington, Kentucky in March 1946 (R. 390, 393). By the time he married her, petitioner had obtained $20,000 from Mrs. Grehan (R. 396, 409). He left her on December 28, 1946, the day following their marriage (R. 405), but called her frequently during the year 1947 (R. 407).

Petitioner arrived at San Antonio on January 5, 1947, and, after a brief but vigorous courtship, Mrs. Ashe agreed, on January 8 or 9, to marry him (R. 241-242). On January 25, 1947, petitioner entered into a bigamous marriage with Mrs. Ashe (R. 186, 247).

As a result of petitioner's representations that litigation seeking to compel him to establish a trust estate for his son had impounded all his funds and that he needed money to establish the trust estate which would release his funds, Mrs. Ashe, on February 14, 1947, mortgaged a warehouse in Houston, Texas, receiving a check for $27,242.15, drawn on the Second National Bank of Houston (R. 184-185, 247-256, 614-615). Petitioner, accompanied by Mrs. Ashe, took the check to the Second National Bank of Houston (R. 257), where he exchanged it for two cashier's checks, totaling $17,000, payable to the Railway Express Agency;

a cashier's check for $200 payable to the attorney of the title company which had placed the mortgage; a cashier's check for $1,000 payable to Mrs. Ashe; thirty $100 traveler's checks; and $6,000 in cash (R. 213-217, 256-258).

Petitioner then went to the Railway Express Agency in Houston, leaving Mrs. Ashe in a taxi (R. 258-259). There he exchanged the cashier's checks for one hundred $100 traveler's checks and one "unlimited" check[1] for the sum of $7,000, payable at New York (R. 197-205). He represented to Mrs. Ashe that he had sent the money to his Chicago lawyer to establish the trust estate. (R. 258-259.)

The checks were carried in their luggage when petitioner and Mrs. Ashe made a trip from Houston to New York City, leaving February 14 or 15 (R. 431, 496). Petitioner subsequently told Mrs. Ashe that he had replaced the money in a Cincinnati bank in a joint account (R. 274). The first count of the indictment was based upon these transactions (R. 7, 27).

Later, in early May 1947, while they were in Baltimore, petitioner told Mrs. Ashe his lawyer had improperly settled his income tax, that his funds (and the supposed joint account in Cincinnati) had been impounded by the revenue people, and that his lawyer had informed him that unless

[1] An "unlimited" check is one upon which the amount is not printed; any amount can be written in by the agent issuing the check (R. 197, 205).

he could raise a sum of money it might mean the penitentiary. Defendant suggested that she sell her Houston warehouse, lest she be humiliated and embarrassed. (R. 273-275.) On May 28, 1947, she reluctantly sold the building, receiving for her equity a check for $27,360.75 (R. 275-276). Petitioner proceeded in the same manner as when the property was mortgaged, pretending to express the funds to his Chicago lawyer, but ultimately converting the check into cash and traveler's checks, which were carried in their luggage to New York City (R. 206-209, 217-219, 276-278, 431, 496). These transactions formed the basis of count two (R. 7, 28).

The Court of Appeals affirmed the conviction (R. 668-673), Judge Frank dissenting on the ground that the prosecutor "exceeded the bounds of legitimate argument in his summation" (R. 673-678).

ARGUMENT

1. Petitioner contends that the summation of the prosecutor was so prejudicial that it deprived him of a fair trial (Pet. 17-24), but we submit that the court below was correct in holding that, in the light of the whole record, there was no prejudicial error. Petitioner's trial strategy was to impeach the government witnesses. His only witness was Jenkins, who attempted to contradict the testimony of Mrs. Ashe, the principal government witness. Consequently, petitioner's counsel spent most of

his lengthy summation (R. 521-549) endeavoring to convince the jury that the government witnesses, particularly Mrs. Ashe, had testified falsely. He labored to persuade them that Mrs. Ashe's testimony was too fantastic to believe unless she was a "moron" or an "imbecile" (R. 530, 532). He told the jury that Mrs. Ashe was a "liar" (R. 548), "a woman who uses her imagination to make up spurious stories" (R. 527) "out of whole cloth" (R. 528). He said that her "imagination [ran] riot at the trial" (R. 525), and that the jury could not "believe her concoctions" (R. 537), since every "time she was cornered she was ready to make up another story" (R. 538). Forty-nine such vituperative references can be counted. He also depicted Mrs. Ashe as urging petitioner into the marriage (R. 535), declaring that they were "mature people" (R. 536) in love, but they did "a foolish thing to spend the money on the honeymoon, and on horses, without thinking of the future" (R. 548). He argued that petitioner could have had no intention of defrauding Mrs. Ashe since most of the money was spent on her and her relatives, "for her pleasures" and "to impress her circle of friends" (R. 537).

The criticized summation was the response to the vicious attack on the character of Mrs. Ashe, and to the simultaneous attempt to hide petitioner's frauds by portraying them as lover's contributions to an extravagant honeymoon. The prosecutor

suggested that petitioner's counsel had revealed a sense of insecurity about certain telegrams in evidence, because on their face they showed petitioner to be "a crook and a phony" (R. 549). He said that it was laughable to label petitioner's relationship with Mrs. Ashe as "love," that petitioner was "the type of bird that preys on society in this slimy field," chosing victims who will not report, but that once in a while a woman like Mrs. Ashe has the necessary courage to participate in the prosecution (R. 553).[2]

As the majority of the court below pointed out (R. 671), there was ample evidence to show how despicable petitioner's misconduct had been.[3] His bigamous activities, proved without contradiction, showed clearly that he intended to defraud Mrs. Ashe. As the court below said, "Such a portrayal in the evidence * * * did lend itself to caustic comment" (R. 671). We feel that the characterization was not unfair in the face of the record and the provocation of petitioner's counsel. See *Webb* v. *United States*, decided September 6, 1951, No. 4245

[2] Petitioner's counsel suggested himself that if the Government evidence was to be believed petitioner was a "faker" (R. 527, 528, 533, 534), a "thief" (R. 539, 542), and "a gigolo" who "lives on women" (R. 535).

[3] The court below did not consider it necessary to state the evidence since it was so close to that of the first trial. On the appeal from the first trial Judge Learned Hand stated: "the record discloses the trail of a patent swindler, who three times played upon the credulity of single women, fleeced them of all they had, and abandoned them. A jury who did not infer from this history that the enticements were false by which he abused his victims' confidence, would be incompetent to serve at all." 176 F. 2d at 566.

(C.A. 10) (not yet reported); *United States* v. *Cohen*, 177 F. 2d 523, 526 (C.A. 2), certiorari denied, 339 U.S. 914; *Pietch* v. *United States*, 110 F. 2d 817, 822-823 (C.A. 10), certiorari denied, 310 U.S. 648.

Petitioner points to other alleged errors in the summation most of which are discussed in the majority opinion below (R. 670-672).[4] We believe there is little to be gained in reiterating here what that court so convincingly stated.

It should further be noted that petitioner entered no objections during the course of the prosecutor's summation. Instead he sat idly by until it was completed and then he moved for a mistrial. In view of the fact that his own summation provoked the prosecutor's reply, he was clearly not entitled to a mistrial. He could have asked for an instruction to the jury to disregard the prosecutor's remarks but he made no request for an instruction concerning the argument of counsel. The court did charge (R. 572):

> You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture,

[4] Among other points, petitioner assigns as error a reference by the United States Attorney to Court's Exhibit 1, a statement made by Mrs. Ashe, which was not admitted in evidence (Pet. 21-22). It was, however, part of the evidence, without objection, that Mrs. Ashe had made the statement (R. 371, 441). The jury was thus already aware of its existence, and the prosecutor did not mention the contents of the exhibit. Furthermore, the trial judge, during the jury's deliberations, told the jury they could not consider the statement (R. 595).

> sympathy, passion, prejudice, public opinion or public feeling. * * *
>
> * * * As to any statement or argument made by counsel concerning the facts in the case, you must not regard such argument or statement as evidence * * *.

Since the petitioner made no exception or request for further instructions concerning the summation, he must have been satisfied at the time that the charge as given was adequate, and cannot at this late date be heard to complain. Rule 30, F.R. Crim. P.; *Pietch* v. *United States, supra.*[5]

2. Petitioner contends that evidence produced against him at the trial was obtained by an illegal

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[5] Petitioner's argument that the trial court abused its discretion in curtailing defense summation (Pet. 25-29) is without merit. Defense counsel had sought to point out that the prosecutor at the second trial had assisted at the first and complains that he was not allowed to prove such fact by referring to the record of the second trial (R. 546-547; see also opinion below (R. 670)). The court declined to enter into a controversy about the matter and told petitioner's counsel to conclude his summation (R. 547). Before the occurrence stressed by petitioner, the trial court had informed petitioner's counsel that he had been talking for an hour and fifteen minutes and that he must complete his summation in ten more minutes (R. 545). As the court below stated, the "episode shows nothing more than judicial impatience, which we are not prepared to say was unjustified under the circumstances, but, however that may be, it was no more than an exercise of the discretion to limit summation on a point which the judge justifiably believed had already been made repetitiously" (R. 670).

Contrary to petitioner's assertion (Pet. 26), the record does not show that Mr. McAuley was one of the prosecutors at the first trial; it merely shows that he was present (R. 499). Since defense counsel was arguing about the agent's testimony concerning instructions by Mr. Lauritano, the prosecuting attorney at the first trial, the presence of Mr. McAuley at the first trial was in any event irrelevant.

search and seizure of his belongings (Pet. 29-36). The only witnesses produced by the petitioner at the hearing (R. 30-123) on the motion to suppress and return the evidence in question were Mrs. Ashe and the F.B.I. agent, Jones. Their testimony and affidavits, contradicted only by the general allegations of petitioner (R. 13-14), showed that petitioner was arrested at a race track near Cumberland, Maryland (R. 17). At petitioner's insistence, Mrs. Ashe, supposing herself to be his wife, was taken to a hotel. She checked into a room into which their luggage was deposited. (R. 18.) While she was registering, petitioner gave her what he believed to be all the keys to the luggage (R. 18-19, 65), leaving her to understand she was in "complete charge of the baggage" (R. 93).[6]

The next day, Mrs. Ashe, still believing herself to be petitioner's wife, consented to the search and seizure of the luggage (R. 20, 43, 93). In the course of the search it was discovered that Mrs. Ashe did not have the key to the Gladstone which contained petitioner's papers. Jones went to the jail to secure it from petitioner. (R. 64.) Petitioner told him that he had given the key to Mrs. Ashe. Jones then asked if he objected to the breaking of the lock. Petitioner replied: "If you want

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[6] It was brought out at the trial that he later gave her a "complete power of attorney" over his personal effects (R. 289-290), under which she sold his automobile, clothing and other personal effects (R. 363).

to open the bag go ahead and break the lock, I don't care," or "I have no objection" (R. 65).

After the hearing, the District Court found "as a fact uncontradicted on this record that the defendant voluntarily gave permission to Agent Jones to open the Gladstone bag" (R. 118). It also ruled that petitioner waived his right to suppress the evidence by not raising the question at his first trial (R. 119).[7]

The court of appeals affirmed the order denying the motion to suppress without discusssing either ground for the ruling below. Instead it stated that petitioner had no right to object to the search of premises not occupied by him, nor to the seizure of property not within his possession (R. 669-670). The court below did, however, point out that the search was consented to by Mrs. Ashe who was in sole possession of the premises and the property seized.

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[7] During the hearing on the motion to suppress, petitioner moved for the production of a report made by Jones to the F.B.I. for the purposes of testing his credibility. The court denied the motion. (R. 57.) Petitioner maintains that the ruling was prejudicial, and contrary to prior decisions in the Second Circuit (Pet. 37-40). It is unnecessary here to consider the soundness of the rule in the Second Circuit that an accused is entitled to "access to documents relevant to his defence, which are in the possession of a department of the Government, whose regulations make them unavailable at the trial." *United States* v. *Grayson*, 166 F. 2d 863, 870. As the court below pointed out (R. 670), the denial of the motion could not have been prejudicial, since Mrs. Ashe as well as Jones had testified to the circumstances of the search, i.e., that petitioner had given her complete control of the luggage and that she had consented to the search and seizure.

Assuming timeliness of the motion, it was for the trial court to determine whether or not there had been consent to the search. *United States* v. *Bianco*, 96 F. 2d 97 (C.A. 2). There was evidence that petitioner himself had consented to the search. There was further evidence that he had previously relinquished complete control of the property to his wife and therefore was not even in a position to refuse his consent. Since it is uncontradicted that the evidence was not obtained by an illegal search and seizure, the validity of the general rule stated by the court below as to the persons who have standing to complain of an illegal search and seizure is not really involved in this case.[8]

3. Finally, petitioner contends at some length (Pet. 40-51) that there was failure to prove (a) that he transported "money" of the value of $5,000 or more or (b) that the property transported was stolen.

The first count of the indictment alleged that petitioner "did unlawfully, wilfully and knowingly transport * * * in interstate commerce * * * the sum of approximately $26,000, which

[8] The instant case is thus not in conflict with the holding in *Jeffers* v. *United States*, 187 F. 2d 498 (C.A.D.C.), pending on writ of certiorari, No. 3, this Term. In the *Jeffers* case no consent to search the room was obtained either from its occupants or from the owner of the property seized. Since the search there was *without consent*, the question was whether the owner of the seized contraband, who had no interest in the room, had standing to object to the illegal search. The court below pointed out that Mrs. Ashe, in sole possession of the room and the luggage, consented to the search and seizure (R. 669-670).

sum the defendant had theretofore taken feloniously by fraud and with intent to steal and purloin" (R. 7). The second count substituted the figure of $23,500.

(a) Petitioner first questions the use of the word "sum." He suggests that the indictment should have stated the cash and securities separately since the offense under 18 U.S.C. 415 (now 2314) is the transporting of "goods, wares, or merchandise, securities, or money, of the value of $5,000 or more." There are two answers to petitioner's contention, both clearly detailed by the court below (R. 669). First, he had the benefit of a bill of particulars (R. 27-29) which listed the various securities and moneys that made up the sums in question (as well as a previous trial where the entire proof of the Government had been exposed). Second, the indictment clearly stated a crime in compliance with Rule 7(c), F. R. Crim. P.

(b) Petitioner also contends that the fact that he converted the proceeds of the checks he fraudulently obtained into cash, traveler's checks and other negotiables before crossing state lines, precludes a conviction for transporting fraudulently obtained goods in interstate commerce. His argument (Pet. 45-51) is that the exchange of the fraudulently obtained checks for traveler's checks and cash was a valid transaction, and that Mrs. Ashe never had title to the traveler's checks and

cash. Therefore, he contends, he did not transport fraudulently obtained property.

By the same token, he would argue that a thief could steal five $1,000 bills and by exchanging them for ten $500 bills avoid any possible prosecution under the Stolen Property Act. We think the view of the court below in the first *Walker* case, as expressed by Judge Learned Hand, adequately disposes of petitioner's contention (176 F. 2d at 566):

> * * * it cannot be seriously argued that, if the accused defrauded his victim of bills of a large denomination and changed them into smaller bills, or vice versa, he would escape; and we recognize no distinction between such a case and the exchange of money from ordinary bank cheques into Travellers cheques.

There is a further answer to petitioner. The fraud continued after he had cashed the checks. Cf. *United States* v. *Sheridan*, 329 U. S. 379. The proof under the first count (that under the second count was similar) showed that he represented to Mrs. Ashe that an Illinois court was requiring him to set up a trust fund for his son's education and that his own funds were tied up in litigation. At his request, on the basis of these misrepresentations, Mrs. Ashe mortgaged her warehouse and endorsed the check over to petitioner. He cashed it receiving cashier's checks and currency. He and Mrs. Ashe then went to the Railway Express

Agency. Petitioner left her in the car representing that he was going inside to express the money to his attorney. Instead he exchanged the cashier's checks for traveler's checks. When he came back to the car he fraudulently represented that he had expressed the money to his attorney. It is quite obvious then that the conversion from checks, to cashier's checks and to traveler's checks was all part of the one fraudulent transaction with the fraudulent representations continuing throughout. It was Mrs. Ashe's money that was supposedly expressed to the attorney, not petitioner's. It was Mrs. Ashe's money that petitioner pocketed.

CONCLUSION

Petitioner's contentions are clearly without merit. Furthermore no conflict of decisions or important question is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1951.

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